IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

WP(C).No. 31835 of 2005(M)

PETITIONER:

KOORARA VASU, S/O. BAPPU,
KANDAMKUNNU AMSOM, KIDANHI DESOM,TELLICHERRY TALUK.

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SRI.K.MOHANAKANNAN

RESPONDENTS:

*** 1. V.C. RAJAN NAMBIAR, S/O.SANKARAN NAMBIAR**

2. V.C. MADHAVAN NAMBIAR, S/O. SANKARAN NAMBIAR.

3. V.C. KARUNAN, S/O. SANKARAN NAMBIAR.

4. V.C. SASIDHARAN, S/O.SANKARAN NAMBIAR.

5. V.C. GOURI, D/O. SANKARAN NAMBIAR.

6. V.C. SARASWATHI, D/O.SANKARAN NAMBIAR.

7. V.C. PADMINI, D/O.SANKARAN NAMBIAR.

8. V.C. USHA DEVI, D/O.SANKARAN NAMBIAR.

9. V.C. ASHALATHA, D/O.SANKARAN NAMBIAR.

*** (ALL ARE RESIDING IN KOOTHUPARAMBA AMSOM, AMBILAT DESOM, KANNUR DISTRICT).**

BY ADV.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.31835/2005 M

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE PLAINT IN O.S.NO.176/1993 FILED BY THE POWER OF ATTORNEY HOLDER OF THE PETITIONER IN MARCH 1993 ON THE FILE OF THE SUB JUDGE, Tsry.

EXT.P2: COPY OF THE WRIT STATEMENT FILED BY THE DEFENDANT IN O.S.NO.176/93.

EXT.P3: COPY OF THE PETITION FOR AMENDMENT FILED BY THE ATTORNEY OF THE PETITIONER IN OCTOBER, 1994.

EXT.P4: COPY OF THE ADDITIONAL WRITTEN STATEMENT FILED BY THE DEFENDANTS ON 3/11/1994.

EXT.P5: COPY OF THE JUDGMENT DTD. 28/11/1994 IN O.S.NO.176/1993 ON THE FILE OF THE COURT OF THE SUB JUDGE, THALASSERY.

EXT.P6: COPY OF THE DECREE DTD. 28/11/1994 IN O.S.NO.176/1993 ON THE FILE OF THE COURT OF THE SUB JUDGE, THALASSERY.

EXT.P7: COPY OF THE JUDGMENT OF THIS HON'BLE COURT IN A.S.NO. 329/95 DTD. 16/05/2005.

EXT.P8: COPY OF THE ADDITIONAL WRIT STATEMENT FILED BY THE DEFENDANTS ON 25/07/2004.

EXT.P9: COPY OF THE ADDITIONAL WRITTEN STATEMENT FILED BY THE DEFENDANTS ON 25/07/2004.

EXT.P10: COPY OF THE REJOINDER TO THE ADDITIONAL WRIT STATEMENT FILED BY THE RESPONDENTS IN O.S.NO.176/93.

EXT.P11: COPY OF THE I.A.NO.1677/2005 ALONG WITH THE AFFIDAVIT IN O.S.NO.176/1993 FILED BY THE PLAINTIFF IN O.S.NO.176/1993.

EXT.P12: COPY OF THE COUNTER STATEMENT FILED BY THE RESPONDENTS 1 TO 4 IN AUGUST, 2005.

EXT.P13: COPY OF THE ORDER DTD. 28/10/2005 IN I.A.NO.1677/2005 IN O.S.NO.176/1993 ON THE FILE OF THE COURT OF SUBORDINATE JUDGE, THALASSERY.

/TRUE COPY/

KSS

PIUS C. KURIAKOSE, J.

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W.P.(C)No.31835 OF 2005

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DATED THIS THE 2ND JULY, 2007

J U D G M E N T

Ext.P13 order of the learned Subordinate Judge, Thalassery dismissing an application for amendment of the plaint is under challenge in this proceeding under Article 227 of the Constitution initiated by the plaintiff. The parties were earlier before this Court in an appeal preferred by the respondents against the judgment and decree of the trial court which was allowed by me under Ext.P7 judgment by way of remand. The application for amendment was filed by the petitioner after the parties entered appearance pursuant to the remand and the learned Subordinate Judge has passed Ext.P13 taking the view that allowing he prayer for amendment will amount to permitting the petitioner, who was the respondent before this Court, to alter the character of the suit, a thing which was not permitted by this Court in Ext.P7.

2. Sri.P.N.Krishnankutty Achan, learned Senior Counsel and Smt.Vidya Nayanar, learned counsel for the respondents have addressed me in extenso. My attention was drawn by the learned Senior counsel to the decretal portion of Ext.P7 judgment while Smt.Vidya would take me through the full text of Ext.P7.

3. The quintessential point which was urged before me by Mr.Krishnankutty Achan was that this Court having permitted the plaintiff to apply for amendment and having noticed that the trial court will be competent to allow the amendment on proper terms, the trial court was not justified in dismissing the amendment application on the ground that the proposed amendment will alter the character of the suit. Drawing my attention to a catena of decisions laying down the law as to the exercise of jurisdiction under Order VI Rule 17 C.P.C., the learned Senior Counsel would submit that the court has power to allow amendment of plaint at any stage of the proceedings even in Second Appeals and all applications for amendment which are necessary for resolving the real controversy involved in the suit were to be allowed, provided the amendment does not cause prejudice to the opposite side.

4. Smt.Vidya per contra would submit that Ext.P7 judgment has become final and that under Ext.P7 this Court had confined the remand to two questions, the first question being the question of limitation in the context of the relief of declaration sought for. According to her, what the court below has done is only to notice from Ext.P7 that this Court has found that the declaration is the principal relief in the suit

and that the relief of recovery of possession is to be treated as a consequential relief. If the present amendment is allowed, the prayer for declaration will be deleted from the plaint and in this way the petitioner will be able to bypass even the bar of limitation which has already set in even against the plea of recovery in a suit which was instituted way back in 1993.

5. In reply Mr.Krishnankutty Achan would submit that this Court has already found in Ext.P7 that the respondents' challenge against the title of the petitioner is without substance and that finding is binding on the respondents. Confirming the impugned order will amount to foreclosing a suit for recovery which any dispossessed title holder is entitled to and such a situation will be sheer injustice, according to Mr.Achan.

6. The submissions of the learned Senior Counsel notwithstanding, I am not prepared to blame the learned Sub Judge for having thought that allowing the petitioner's application for amendment will amount to upsetting Ext.P7 judgment of this Court. In para.14 of Ext.P7, I had clearly stated that the remand which is proposed to be made will be confined to two questions, viz., 1) the question of limitation in the context of the relief of declaration sought

for and 2) whether the plaintiff at any point of time had come into possession of the property and if so, as to when the original defendant or the additional defendants dispossessed the plaintiff. I had also found that the relief of declaration which had been sought in the original plaint remains as the principal relief and that the relief of recovery of possession prayed therein is to be treated as consequential relief. These findings in Ext.P7 will certainly persuade any reasonable mind to think that this Court has not permitted the plaintiff to change his contentions regarding the declaratory relief.

7. At the same time, it should be noticed that in the operative portion of Ext.P7, I had clearly stated as follows:-

"If the plaintiff is desirous of applying for amendment of the pleadings, the court below will be competent to allow such amendment on proper terms."

As a matter of fact, the petitioner-respondent in Ext.P7 appeal had filed C.M.P.No.4532 of 2000 before this Court seeking the same amendment of the plaint. It was noticing that C.M.P. also that I granted permission to the plaintiff-petitioner to seek amendment of pleadings. In fact, the last sentence in Ext.P7 judgment is that the application for amendment will stand dismissed as unnecessary, in

view of the decision taken in the appeal which inter alia is to give liberty to the plaintiff to apply for amendment of the pleadings before the trial court.

8. The judicial precedents cited at the Bar will show that all amendments as are necessary for resolving the real controversy in the suit, even if they tend to change the character of the suit, are to be allowed at whichever stage of the proceedings they are sought, provided the amendment does not result in prejudice to the opposite side or in any injustice. The title claimed by the petitioner under Ext.A1 document has been virtually approved in Ext.P7. To say that the title holder shall not be allowed to recover the property on the strength of title even if the dispossession is within the statutory period of 12 years before the institution of the suit will be unjust. When the amendment application filed by the petitioner is considered by the settled parameters for consideration of applications for amendment under Order VI Rule 17, as enunciated in various decisions including those of the Supreme Court in **Baldev Singh v. Manohar Singh** (2006 (3) KLT 953) and **Sampath Kumar v. Ayyakannu** [(2002) 7 SCC 559], it will have to be found that the application filed by the petitioner is to be allowed, after ensuring that legal prejudice will not

be occasioned to the respondents.

9. The prominent defence of the respondents regarding Ext.A1 is that it is a sham document which has never taken effect and that the respondents have always retained possession of the property, notwithstanding the recitals in Ext.A1. In fact, the question whether the plaintiff-petitioner had at any point of time come into possession and if so when he was dispossessed is specifically stated as one of the two points covered by the remand order in Ext.P7. I am of the view that any legal prejudice to the respondents can be avoided if the order of amendment is made to operate only prospectively, i.e., with effect from 16.5.2005, the date of Ext.P7 judgment, and if suitable cost is awarded to the respondents for the inconveniences which are being occasioned to them on account of the grant of the amendment application. I have also to be mindful of the inconvenience caused to the court also due to the successive amendment applications which have been filed by the petitioner.

10. The result is that Ext.P13 will stand set aside and I.A.No.1677 of 2005 will stand allowed subject to the following conditions:

1) The amendment will operate only with effect from 16.5.2005

and not with effect from the date of institution of the suit;

2) The petitioner shall pay a total amount of Rs.11,000/- by way of costs, out of which Rs.10,000/- shall be paid to the respondents either directly or through their counsel in this Court or in the court below and Rs.1000/- shall be remitted with the High Court Legal Services Committee, within one month from today. If payment/remittance is not made as above, the impugned order Ext.P13 will stand confirmed and the Writ Petition will stand dismissed. But, if payment/remittance is made and this judgment allowing I.A.No.1677 of 2005 becomes operative, the court below will permit the respondents to file additional written statement and if necessary will formulate additional issues and dispose of the suit in accordance with law.

The Writ Petition is disposed of as above.

(PIUS C.KURIAKOSE, JUDGE)

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